89-1961

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JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court
OF THE
United States

OCTOBER TERM 1990

HARRY G. JOHN, as an individual; HARRY G. JOHN, as Trustee, Director and Officer of DE RANCE, INC., and as a Director of Santa Fe Communications; DE RANCE, INC. through its Founder and Sole Contributor, HARRY G. JOHN; and SANTA FE COMMUNICATIONS, through its Founder, HARRY G. JOHN, in a derivative capacity,

Petitioner,

VS.

THE HONORABLE MICHAEL J. BARRON, Individually and in his official capacity as Judge of the Circuit Court of Milwaukee County, State of Wisconsin; DONALD A. GALLAGHER; ERICA P. JOHN; WILLIAM CANNON; THOMAS CANNON; DOES I through XX, Inclusive,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether jurisdiction exists to impose Rule 11 sanctions following a plaintiff's voluntary dismissal pursuant to Fed.R.Civ.P. 41(a)(1)(i), six days after filing of action, two days after service, and before any responsive pleadings are filed, and particularly where plaintiff filed the same action several months later.

2. Whether the district court would abuse its discretion in granting sanctions where it, on its own motion, denied all discovery that would prove the allegations in plaintiff's complaint were true and that the plaintiff had made a reasonable investigation of the facts.

3. Whether the case should be ordered returned to the trial court to permit plaintiff to engage in discovery where the District Court denied all discovery on its own motion, then dismissed the case, without giving the plaintiff the opportunity to prove that he had made a reasonable investigation of the facts and the law prior to filing the suit, and is ready to levy sanctions against the plaintiff who can prove every paragraph of the allegations if he is allowed reasonable discovery.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals Seventh Circuit is set out in the Appendix pp 1a-13a.

The opinion of Judge Robert Warren dated December 15, 1988 pp 14a-21a.

The opinion of Judge Robert Warren dated March 17, 1989 pp 22a-24a.

The opinion of Judge Terrance Evans dated December 15, 1988 pp 25a-38a.

The opinion of Judge Terrance Evans dated June 9, 1989 pp 39a-44a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 8, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1)

STATUTORY PROVISIONS INVOLVED

Respondents filed for sanctions against Petitioner pursuant to Fed.R.Civ.P. 11 which provides in relevant part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading . . . , that to the best of his knowledge, information, and belief formed after *reasonable inquiry* it is *well grounded in fact* and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . If a pleading

> motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the expenses reasonably incurred because of the filing of the pleading, motion, or other paper including a reasonable attorney's fee.

Prior to filing for sanctions, Petitioner had dismissed pursuant to Fed.R.Civ.P. 41(a)(1)(i) which provides:

> An action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . .

The filing was under 42 U.S.C. 1983 which reads as follows:

> Every person who, under color of any statute, ordinance or regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

To obtain a clear picture of the background of this case, it is helpful to visualize a young man in his early twenties who inherits a considerable amount of money, and instead of living an opulent life style and enjoying the luxuries of life, decides on a frugal life style, going to mass and

communion daily, and committing his assets to the sick, unfortunate and those in most need, such as building a kitchen to feed the poor in downtown Milwaukee, buying and equiping a school to educate the blacks in Milwaukee and Chicago, funding a leper colony in Africa, supporting missionaries, etc.

Harry John was born the heir to part of the Miller Brewing Company holdings. The Miller Brewing Company of Milwaukee, Wisconsin was founded by Mr. John's grandfather, Frederick E. Miller, in 1855. In 1946 Harry John created the De Rance Foundation originally for the express purpose of furnishing financial support to contemplative (cloistered) religious orders of the Roman Catholic Church who could not earn money for themselves. The Foundation took its name from the founder of the Trappist Order, Armand-Jean de Rance. Mr. John became a modern day Saint Francis, donating his assets to the Foundation for the benefit of the poor and unfortunate, and living a modest life style in a middle class neighborhood in Milwaukee, with his wife and nine children.

At its inception, Harry John funded De Rance with dividends from his brewery stockholdings which were then in trust, and from other personal assets. Upon termination of the Trust, Mr. John donated the stock to De Rance in a series of gifts in 1952, 1953, and 1955. At the time of those transfers the holdings were worth a maximum of Fourteen Million Dollars ($14,000,000.00) and constituted nearly 50% of the shares of the Miller Brewing Company. In 1970 De Rance sold the stock to Phillip Morris Company for Ninety-seven Million Dollars ($97,000,000.00), spurning an offer from Peter Grace of Thirty-three Million Dollars ($33,000,000.00). Thereupon becoming the largest foundation in the world devoted to

support of endeavors involving the Roman Catholic Church.

The Board of Directors of De Rance consisted of Mr. Harry John, his former wife, Erica John, and Mr. John's long-time friend, Donald Gallagher. Mr. Gallagher and Mr. John were also the only trustees of the foundation. The foundation increased in value to over Three Hundred Million Dollars ($300,000,000.00). Between 1970 and 1984 De Rance made grants of over One Hundred Twenty-five Million Dollars ($125,000,000.00) to various charities throughout the world. The majority of the beneficiaries of the grants were organizations or individuals affiliated with or involved with the Roman Catholic Church. Despite the grants made, by 1983 the remaining assets of De Rance were approximately One Hundred Eighty-eight Million Dollars ($188,000,000.00).

Approximately ten days before the action was filed in the State Court, Archbishop Pio Laghi, the Ambassador from the Vatican to the United States, summoned Donald Gallagher and Eirca John to his diplomatic offices and residence in Washington, D.C. and advised Mr. Gallagher and Mrs. John to commence litigation against Harry John to oust him from his position with the De Rance Foundation. The action by Archbishop Pio Laghi, was instigated by Archbishop Rembrant Weakland and Peter Grace who met together in Milwaukee to instigate the conspiracy, and arrange for the legal procedure to remove Mr. John. Peter Grace had previously taken advantage of the De Rance Foundation to the extent of Ninety-seven Million Dollars ($97,000,000), and had previously gained control through the use of a conspiracy of the Kenedy-East Foundation which was worth over Four Hundred Fifty Million Dollars ($450,000,000). When Mr. John gifted his property to De Rance, Inc. he provided that on

its dissolution or Mr. John's death all of the assets of De Rance, Inc. were gifted to the Archdiocese of Milwaukee of which Archbishop Weakland was the head as a corporation sole.

On October 5, 1985 a civil action was commenced by Donald Gallagher and Erica John against Harry John in the Circuit Court of Milwaukee County, Wisconsin and at the commencement of the action an ex parte order was obtained removing Mr. John from his position as Director and Trustee of the Foundation. Mr. Gallagher and Mrs. John purported to proceed under 776.32(4) of the Wisconsin statutes and alleged that Harry John was guilty of gross misconduct in mismanagement and waste of the assets of the Foundation. Trial of the case was held in the Circuit Court of Milwaukee County between April 14, 1986 and August 20, 1986.

Prior to the trial, during trial, and upon subsequent appeal the defendant Harry John argued inter alia that he was entitled to trial by jury, that his rights to the free exercise of his religion were impaired or contravened by the proceedings and that he was denied due process of law. On August 21, 1986, the trial court rendered its decision holding on behalf of the plaintiffs and against defendant Harry John and ordering Mr. John's permanent ouster from his positions as a Director and Trustee of the De Rance Foundation. Subsequent thereto the trial judge enlarged his holding to enter judgment against Mr. John for over One Million Dollars ($1,000,000) for equitable disgorgement. Judgment on these holdings was entered by the trial court on December 21, 1987. An appeal was duly pursued to the Wisconsin Court of Appeals, District I, and the decision affirming the trial court was entered by the Court of Appeals of Wisconsin on November 24, 1989. A Petition for Review was filed

with the Wisconsin Supreme Court and that Petition was denied on February 20, 1990.

After the trial was over, Mr. John learned that Judge Barron had been an employee of Archbishop Weakland, and one of his legal advisors, and on the dissolution of De Rance or the death of Mr. John, whichever occurred first, all of the assets of De Rance which on October 5, 1985, were One Hundred Sixty Million Dollars ($160,000,000.00), would be transferred to Archbishop Weakland. Judge Barron should have recused himself from the case. Instead of recusing himself, he entered into a conspiracy to remove Mr. John from the foundation he founded and solely funded no matter what the evidence produced.

He not only removed Mr. John as a Trustee, which is a voting member, similar to a stockholder in a for profit corporation, who has no management function, but as a director when he was in the minority and outvoted two to one, and gave judgment against him for over One Million Dollars ($1,000,000.00) in favor of De Rance which was not a party plaintiff, not referred to in the body of the complaint, not requested in the prayer. He accused a man who had devoted his entire life to charity and helping others, of perjury, tax fraud, stock manipulation, front running, a giver or taker of bribes, and of being mentally ill. Almost anything bad you could say of a business man, Judge Barron accused Mr. John of it. The purpose of those statements was to set the scene to annul a later power of appointment Mr. John exercised in favor of another non-profit corporation rather than the Archdiocese of Milwaukee of which Archbishop Rembrandt Weakland was the head.

When Mr. John, after the trial, learned of the details of the conspiracy, he filed suit in the District Court of the

Eastern District of Milwaukee and the case was assigned to Judge Warren. It was discovered that there were small errors in the complaint, and rather than refile it, it was dismissed six days later just after three defendants were served and before any other action other than service was taken. Shortly after the dismissal, a Rule 11 motion was filed by the defendants. Volumes of material were filed by the plaintiff showing the details of the conspiracy, how Eighty-eight Million Dollars ($88,000,000.00) were taken from De Rance after Mr. John was removed, how over Five Million Dollars ($5,000,000.00) of De Rance money was spent on attorneys fees while Mr. John was only allowed Twenty-five Thousand Dollars ($25,000.00), how Mr. Jeffers hired one of the foremost experts in the United States on 42 U.S.C. 1983 for the law on the subject, and how he had spent months, and months investigating the facts of the case, and personally talked to over 90% of the people involved in the case.

Nevertheless, Judge Warren awarded One Thousand Dollars ($1,000.00) in Sanctions against Mr. John and One Thousand Dollars ($1,000.00) in Sanctions against Mr. Jeffers and referred the matter to Judge Evans to rule on the defendants' request for approximately Thirty Thousand Dollars ($30,000.00) in fees pursuant to Rule 11.

On March 30, 1988, the revised suit, which is almost identical to the first one filed, was filed. Without a hearing, Judge Evans dismissed the suit against Judge Barron on the grounds of judicial immunity, ignoring *Pulliam v. Allen*, 466 U.S. 522 (1984) and on his own motion denied any discovery, and granted a motion for summary judgment against Mr. John without a hearing and without allowing him any discovery whatsoever. Defendants moved for sanctions under Rule 11. Ruling on

the sanctions is awaiting the results of this appeal. Plaintiff knows that if he is allowed to complete his discovery he can prove the conspiracy beyond doubt, and the part each person played.

Judge Barron was made Chief Judge of Milwaukee County Circuit Court and assigned his former partner Judge Patrick Sheedy to hear the John separation of assets case and awarded half of Mr. John's separate property to his wife, Erica, and ordered the assets sold at distressed prices. Mr. John's assets were tied up in the divorce court over five years so that he was deprived of assets to defend himself.

During the lawsuit the conspirators circulated adverse news releases and sponsored articles in the media saying Mr. John wore "three pairs of pants at one time", that he took all "the doors off the house", that "his closest friend and adviser" was a retarded janitor that Mr. John had given a job to and free housing because he had a family and no income.

The attack on Mr. John was so massive and diabolical that it is hard to imagine. The papers covered the news in a biased fashion and withheld news that was detrimental to Erica John and Donald Gallagher. All Mr. John wants is to be able to engage in discovery and prove the facts.

As Judge Evans said in the District Court for the Eastern District of Milwaukee, "Milwaukee is a large city but the legal community is quite small and closely knit." He had been a partner with attorneys who had worked on the case, and was a former Circuit Court Judge in Milwaukee County, and a friend of Judge Barron. Justice Coffey who was on the panel that heard the appeal in the Seventh Circuit was a former judge of the Circuit Court of Milwaukee County, and a friend of Judge Barron. The

attorneys for Erica John and Donald Gallagher are the sons of Robert Cannon who is a former judge of the Circuit Court of Milwaukee County and of the Court of Appeals for District I which is in Milwaukee County.

Plaintiff's attorney is fearful that when the case is returned to the District Court to rule on Sanctions they will be extremely heavy and devastating to Mr. John and his attorney, especially since Mr. John's attorney is from not just another city, but out of the State.

Mr. John's attorney knows the danger of going out of town, let alone to a Midwestern town, but had no idea of the closeness of the Milwaukee legal community which extends into the Federal Courts and into Chicago. The evidence of the conspiracy is so clear, the prior record of conspirators is so clear, and the fact that Mr. John contributed over Three Hundred Million Dollars ($300,000,000.00) from his initial capital plus investments is so clear, and that fact that over Eighty-eight Million Dollars ($88,000,000.00) has been taken from the foundation since his removal is so clear, that Mr. John and his attorney could not believe that the Federal Court would do anything but rectify the situation.

The trial in the Circuit Court centered around two items of mismanagement by Mr. John. One was the establishment of a Catholic Television presence in the United States, and the other was the search for the Central America, a ship that had sunk off the coast of South Carolina with Four Hundred Fifty Million ($450,000,000.00) in gold. Mr. John was removed from the television operation just before a big telethon that would have raised large sums of money. After his removal millions of dollars in television equipment were transferred to the Eternal Word Television network in Birmingham, Alabama, run by Mother Angelica, a

Franciscan nun, and controlled by Peter Grace. The Central America has since been discovered by a group headed by Thomas Thompson, who Mr. John hired to work for Mr. John and who obtained confidential information from Mr. John including underwater side scan sonar maps that had the image of the ship and its exact location. Mr. John has made a claim in the Federal District Court in Norfolk, Virginia for a share of the treasure, however his credibility and integrity has been seriously hampered by Judge Barron's opinion which castigated him.

If the case can be returned to the District Court Mr. John can prove that Barron's statements are false.

The De Rance Foundation has been run by Richard De Graf, an employee of Peter Grace and formerly with Mother Angelica's Eternal Word Television network, and J. P. Bolduc, as Executive Director, who is the Vice Chairman of the Board of the W. R. Grace Co. under Peter Grace. Mr. Grace has a long record of taking over foundations and charities. This is all documented.

Mr. Grace by fraud and manipulation took control of the Kennedy-East Foundation, based in South Texas with assets of over Four Hundred Fifty Million Dollars ($450,000,000.00). He was sued in the Texas courts and settled for Fourteen Million Dollars ($14,000,000.00), when he was not entitled to one cent. A book has been written describing how he did it. The title of the book is "If You Love Me You Will Do My Will" by Stephen G. Michaud and Hugh Aynesworth.

REASONS FOR GRANTING THE PETITION

Rule 11 of the Federal Rules of Civil Procedure, as amended in 1983, has been both vigorously and unevenly applied, leaving the federal judiciary and bar in an "Era

of Sanctions", but lacking an integrated code to supply coherent guidance. See *Eastway Construction Corp. v. City of New York,* 821 F.2d 121 (2d Cir. 1987) (Pratt, J. dissenting) (noting "apparent disparities, even capriciousness, (now seem) to characterize much of Rule 11 jurisprudence"). As a result, Rule 11 has become the cottage industry of the litigation bar. See Vairo, Rule 11: A Critical Analysis, 118 F.R.D. 189, 199 (1988).[2] As one commentator has stated:

> Whether Rule 11 is upgrading the quality of civil litigation practice is debatable. That it is adding to the quantity is not. More than 1000 Rule 11 decisions have been rendered since August 1983. The rule generates its own momentum: Lawyers move for sanctions; judges invite lawyers to move for sanctions; lawyers move for sanctions against lawyers whose offense is a prior motion for sanctions. This is happening here.
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> * * * *
>
> It is apparent that not all judges agree, in philosophy or in practice, on precisely what conduct constitutes a violation of the rule. Practicing under Rule 11 is like negotiating a minefield. You know there will be

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[2]Along with the escalation in Rule 11 litigation, there has been an "explosion" of Rule 11 literature. Much of it is highly critical of Rule 11. See Vairo, 118 R.R.D. at 200 n. 59 (citing Nelken, Sanctions Under Amended Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation and Punishment, 74 Geo. L.J. 1313 (1986); Note, Plausible Pleading: Developing Standards for Rule 11 Sanctions, 100 Harv. L. Rev. 630 (1987); see also, Note, A Uniform Approach to Rule 11 Sanctions, 97 Yale L.S. 901 (1988); Schwarzer, Rule 11 Revisited, 101 Harv. L. Rev. 1013 (1988); Joseph, The Trouble with Rule 11 — Uncertain Standards and Mandatory Sanctions, 73:8 A.B.A.J. 87 (1987).

> an explosion if you step on a mine. The trouble is, you don't know where the mines are.
>
> Joseph, The Trouble with Rule 11 — Uncertain Standards and Mandatory Sanctions, 73:8 A.B.A.J. 87, (1987).
>
> Judge Schwarzer, of the Northern District of California, writes that the application of Rule 11 is confused and that the court's standards are unpredictable. Schwarzer, Rule 11 Revisited, 101 Harv. L. Rev. 1013 (1988). In Judge Schwarzer's view, this raises an issue of fairness, because "sanctions may have penal consequences, including injury to a lawyer's reputation, investigation by state bar associations, and adverse effects on malpractice insurance coverage." *Id.*

Not surprisingly, the Federal Courts of Appeals are split over several key issues in this case. Direct conflict between the circuits exists on the issue of whether a trial court retains jurisdiction to impose Rule 11 sanctions following a Rule 41 notice of voluntary dismissal. The courts are also not in agreement as to the standards to be used in determining the reasonableness of the plaintiff's prefiling inquiry in an 1983 case. Further, there is conflict as to whether an "abuse of discretion standard" is appropriate for the review of Rule 11 sanctions. Lastly, there is conflict over the interrelation between Fed.R.Civ.P. 11 and Fed.R.App.P. 38; in this case the appellate court did not levy sanctions on appeal but referred the matter to the California Bar Association which was embarrassing to Mr. John's counsel; the courts are split as to whether a party is automatically entitled to sanctions for the appeal when the appellate court affirms the lower court's imposition of sanctions. These issues, involving uniform enforcement of the Federal Rules of Civil Procedure, and the

standard of conduct expected of the federal bar, are particularly suited to review by this Court. See generally *Hickman v. Taylor,* 329 U.S. 495 (1946) *Schlagenhauf v. Holder,* 379 U.S. 104, 109 (1964) *Hanna v. Plumber,* 380 U.S. 460, 463 (1965).[4]

It is respectfully submitted that the uncertainty facing other litigants, and the legal profession itself, caused by the lack of uniformity on these fundamental issues mandates further review of and a definitive answer on these issued by this Court.

I.

THERE IS A SPLIT OF AUTHORITY OVER WHETHER A DISTRICT COURT MAY IMPOSE RULE 11 SANCTIONS FOLLOWING A VOLUNTARY DISMISSAL PURSUANT TO FED.R.CIV.P. 41 (A) (1) (i)

In its opinion, the Seventh Circuit held that a Rule 41(a) notice dismissal did not deprive the District Court

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[4]See also *Schiavone v. Fortune,* 477 U.S. 21 (1986) (certiorari was granted because of an apparent conflict among the Courts of Appeals regarding Fed.R.Civ.P. 15(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986 (granted certiorari to resolve conflict concerning standard to be applied under Fed.R.Civ.P. 56); *Daily Income Fund, Inc. v. Fox,* 464 U.S. 523 (1984) (certiorari was granted to resolve a conflict regarding demand requirement of Fed.R.Civ.P. 23.1); *White v. H.H. Department of Employment Security,* 455 U.S. 445 (1982) (certiorari was granted to resolve the timeliness standard set forth in Fed. R. Civ. P 59(e); *Snyder v. Harris,* 394 U.S. 332 (1969) (certiorari was granted to resolve the conflict of whether Rule 23 allows separate claims to be aggregated to meet the $10,000 jurisdictional minimum); *State Farm Fire & Casualty Co. v. Tashire,* 386 U.S. 523 (1967) (certiorari was granted because the case involved "a matter of significance to the administration of federal interpleader").

of jurisdiction to impose Rule 11 sanctions. This holding is in accord with similar holdings in the First, Eighth and Ninth Circuits, and in direct conflict with holdings in the Second and Fifth Circuits. Relying on the Second Circuit decisions in *Johnson Chemical Co., Inc. v. Home Care Products, Inc.* 823 F.2d 28 (2d Cir. 1987), and *Santiago v. Victim Services Agency,* 753 F.2d 219 (2d Circuit 1985), Jeffers argued that once he filed a Rule 41(a) dismissal, the District Court was deprived of jurisdiction to impose Rule 11 sanctions. In rejecting Jeffers' argument on appeal, the Court of Appeals relied on the decision of the Seventh Circuit in *Szabo Food Service, Inc. v. Canteen Corp.* 823 F.2d 1073 (7th Cir. 1987), which explicitly rejected *Santiago* and allowed post-dismissal sanctions even though there was no activity by defendants prior to dismissal.

In reversing a post-dismissal award of attorney's fees, the Second Circuit has stated flatly that, "(o)nce the plaintiff has dismissed the action . . . the Court loses all jurisdiction over the action." *Santiago,* 753 F.2d at 221. More recently, the Second Circuit directly addressed the specific issue of Rule 11 sanctions following a voluntary dismissal. In *Johnson Chemical Co., Inc. v. Home Care Products, Inc.,* 823 F.2d at 30, the District Court had granted the defendant's motion to vacate the plaintiff's voluntary dismissal and sanctioned the plaintiff under Rule 11. Reversing the trial court, the Second Circuit held that the plaintiff has the "unfettered power" to file a notice of dismissal before an answer or motion for summary judgment has been filed. *Id.* (citing *Santiago,* 753 F.2d at 221). The reviewing court concluded that since the plaintiff was plainly entitled to a voluntary dismissal, the District Court lost all jurisdiction after the plaintiffs voluntarily dismissed, and therefore, Rule 11 sanctions could not be imposed. *Id.* at 31.

The Fifth Circuit has reached a similar conclusion on this issue. That court has consistently held that Rule 41(a)(1)(i) means just what it says. *Williams v. Ezell,* 531 F.2d 1261 (5th Cir. 1976) (where defendants filed neither an answer nor a motion for summary judgment prior to plaintiffs' notice of voluntary dismissal, district court had no power or discretion to deny plaintiff's right to dismiss or to assess attorney's fees against them); *Carter v. United States,* 547 F.2d 258 (5th Cir. 1977) The district court has no power to deny the absolute right of a plaintiff to a voluntary dismissal. *Williams,* 531 F.2d at 1264. Further, filing a notice of dismissal automatically ends the case and "except for determining appealability, the subsequent orders . . . (of the district court are) a nullity." *Id.*

The Seventh Circuit, however, has held to the contrary in *Szabo Food Service, Inc. v. Canteen Corp.* 823 F.2d 1073 (7th Cir. 1987). The court directly rejected the reasoning of *Santiago's* holding that the district court lacks jurisdiction "to do anything at all" after voluntary dismissal. The Szabo Court found that a court may lack "jurisdiction" to do some things but not others, and one of the things "jurisdiction" was retained over was post-dismissal imposition of Rule 11 sanctions. *Id.* at 1077-79.

The First and Ninth Circuit have followed the *Szabo* decision, both holding that voluntary dismissal does not deprive the court of jurisdiction to consider a motion for sanctions pursuant to Rule 11. *Greenberg v. Sala,* 822 F.2d 882 (9th Cir. 1987); *Muthig v. Brant Point Nantucket, Inc.,* 838 F.2d 600 (1st Cir. 1988).

There are several reasons to prefer the Second Circuit's holdings in *Santiago* and *Johnson* to that of *Szabo* and its progeny. First, there is the fact that Rules 11 and 41 simply admit to no exception to the "bright line" of the

plaintiff's unfettered power to dismiss voluntarily and with finality pursuant to Rule 41(a)(1)(i). *Johnson,* 823 F.2d at 30. If the drafters had wished to propose such an exception, they could have done so, and it is up to neither a district court to assume, nor a reviewing court to create, authority withheld by the Rules.

Second, permitting even this encroachment upon the letter of Rule 41 is to disapprove the many and varied cases interpreting its provisions strictly. See 5 J. Moore, J. Lucas & J. Wicker, Moore's Federal Practice Sec. 41.02 (2) and (3) (2d ed. 1982) and cases collected therein. Many have tried and failed to chip away at the rule's straightforward language without success for as noted by the Sixth Circuit, "although Rule 41 has been amended three times since 1948, it has not been broadened to include other motions or pleadings which would bar a dismissal by notice." *D.C. Electronics, Inc. v. Martron Corp.,* 511 F.2d 294, 296 (6th Cir. 1975). This consideration — that many years of entirely consistent decisions affirming the unfettered power of a plaintiff to voluntary dismissal would be swept aside by carving an exception for Rule 11 proceedings — was not addressed by *Szabo* or its progeny. This is no small concern; rejection of the accumulated jurisprudence surrounding Rule 41 is to invite other defendants to foray into the Courts of Appeals seeking decisions which would further transform that which has heretofore been a settled and immutable rule. The Johnson opinion preserves these precendents and the value of their guidance to litigants, while *Szabo* questions them even without discussion.

This indirect and perhaps unintended consequence not only is inconsistent with better jurisprudence but also potentially conflicts with a stated purpose of Rule 11 itself — to increase the efficiency of the judicial system,

See Fed.R.Civ.P. 11 advisory committee notes, 97 F.R.D. 165, 198. That is, the affirmance by the 7th Circuit following *Szabo* to increase the reach of Rule 11 will lead to a certain volume of satellite litigation over many other newly-asserted exceptions to the bar of a Rule 41 notice of dismissal. It is respectfully submitted that the potential for accomplishing good in post-dismissal Rule 11 proceedings is far outweighed by the certain harm, measured simply in terms of the multiplicity of assaults on Rule 41, which will surely result from the means to those ends. Thus, the *Johnson* decision not only preserves the integrity of the Rule 41 decisions but also serves one of the purposes of Rule 11.

It is critical that this Court resolve the conflict regarding imposition of Rule 11 sanctions following a Rule 41 notice of voluntary dismissal. Clearly, the existing situation is confusing to litigants. A litigant in a jurisdiction that has not addressed this issue cannot be certain what impact a voluntary dismissal will have on the case. Voluntary dismissal may terminate a case completely or may merely "stop the running of attorneys' fees." See *Szabo*, 823 F.2d at 1079. A litigant will simply have to dismiss and then wait to see how the issue is decided in that jurisdiction. This uncertainty can only impair an attorney's ability to effectively and competently conduct a lawsuit, and may in fact encourage protracted litigation in the hopes that a plaintiff's theory will eventually be supported by the facts, instead of encouraging voluntary dismissals.

Furthermore, the split leads to unequal treatment of litigants. Individuals acting under the same federal rule do not receive the same treatment simply by virtue of the jurisdiction in which they bring suit. Litigants in the Second and Fifth Circuits can dismiss a case voluntarily

and be assured that the entire matter is resolved. Litigants in the District of Columbia, First, Seventh, Eighth and Ninth Circuits, however, will be left hanging following a voluntary dismissal. Indeed, the filing of a voluntary dismissal may actually prompt the imposition of Rule 11 sanctions: a party may voluntarily dismiss, intending to terminate the case completely, only to find themselves faced with sanctions months or even years after the dismissal. One of the primary reasons for having a single set of Federal Rules is to ensure that litigants in all jurisdictions are treated consistently. The split on this issue, however, results in disparate treatement. To assure equal treatment under the Federal Rules of Civil Procedure, and to give guidance to future litigants and the bar, it is respectfully submitted that this Court resolve this very fundamental split in the circuits regarding Rule 11 and Rule 41(a)(1)(i).

II.

THERE IS A SPLIT OF AUTHORITY OVER THE STANDARD OF REASONABLENESS APPLIED TO A PLAINTIFF'S PRE-FILING INQUIRY IN A 42 U.S.C. 1983 CASE

In reaching its decision to affirm the award of Rule 11 sanctions, the Seventh Circuit failed to give any weight to the fact that this was an 42 U.S.C. 1983 case. The Ninth and Sixth Circuits, however, have recently found that the standard of reasonableness of the prefiling inquiry in an antitrust action should be less demanding than that required in other cases. See *Community Electric Service Of Los Angeles, Inc. v. National Electrical Contractors Assoc., Inc.*, 869 F.2d 1235 (9th Cir. 1989); *D & M Orthotics & Prosthetics, Inc. v. Sisters of Mercy Health*

Corporation, No. 88-1945, slip op. (6th Cir. June 5, 1989) (unpublished disposition — available on Westlaw).

The Ninth Circuit has held that in imposing sanctions, each case must be evaluated individually "in light of its own peculiar circumstances." *In re matter of Yagman* 796 F.2d 1165, 1182 (9th Cir.), *reh'g denied and opinion amended,* 803 F.2d 1085 (9th Cir. 1986). The circumstances of an antitrust case are such that the defendants are usually in control of the proof necessary to establish plaintiff's case, as in a 42 U.S.C. 1983 case. *Community Electric,* 869 F.2d at 1246. Because of the disparate access to information, it follows that a less demanding standard should be used in evaluating the prefiling inquiry. This is precisely what the Ninth Circuit has held in *Community Electric,* 869 F.2d 1235. Focusing on the plaintiff's antitrust claims, the court said, "we grant summary judgment less frequently in the antitrust contest, in part because the alleged conspirators control the proof .... This less demanding standard should also apply under Rule 11 to evaluate the associated documents." *Community Electric,* 869 F.2d at 1246 (citations omitted) (emphasis added).[6]

In *D & M Orthotics,* the plaintiffs filed a complaint alleging violations of Sections 1 and 2 of the Sherman Act. Defendants moved for sanctions on the grounds that the prefiling inquiries were inadequate. Prior to filing the case, plaintiff learned from a competitor and some of its own patients that the defendants were "out to destroy"

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[6]The fear of many critics that Rule 11 would become a part of every defendant's litigation base was not ill-founded. The reported cases confirm that Rule 11 is being used disproportionately against plaintiffs, especially in certain types of litigation, including antitrust cases brought by small companies, Vairo, *supra,* 118 F.R.D. at 200, and a 42 U.S.C. 1983 case.

the plaintiff. The court refused to impose sanctions, holding that this circumstantial evidence of a violation was a sufficient basis for the antitrust claims. *D & M Orthotics,* Westlaw p. 3. The district court held that once the complaint based on circumstantial evidence was filed, the facts necessary to prove the claim, including the market power of the defendants, could be developed through discovery. *Id.* at 4. The Sixth Circuit agreed, affirming the district court's denial of sanctions. *Id.*

III.

THE CASE SHOULD BE ORDERED BACK TO TRIAL COURT TO PERMIT PLAINTIFF APPELLANT TO ENGAGE IN DISCOVERY, AND THE DISTRICT COURT'S ORDER DENYING ALL DISCOVERY BE VACATED, SO THAT THE PLAINTIFF CAN PROVE WITHOUT DOUBT ALL THE ALLEGATIONS OF THE COMPLAINT.

As stated before, the complaint alleges a conspiracy to deprive Mr. John of his constitutional rights "under color of law" and the center of the conspiracy is Judge Barron. It has already been proven that Archbishop Pio Laghi called Erica John and Donald Gallagher to Washington and told them that they had to file a suit to remove Mr. John from the foundation that he founded and funded. That 10 days later they filed suit in the Circuit Court of Milwaukee County and the case was assigned to Judge Barron out of order. Fifty cases were held back to give him the case. That has been shown by the case numbers. Mr. John executed a power of appointment that when the foundation was dissolved or when he died all of the assets of De Rance went to the Archdiocese of Milwaukee of which Archbishop Weakland is the head, that has been filed with the court. Judge Barron admits

that he was an employee of Archbishop Weakland and that he gave him legal advice. Since Mr. John has been removed over Eighty-eight Million Dollars ($88,000,000.00) has been stripped from the foundation. This is shown by the financial statements filed with the court.

The only thing that Mr. John cannot prove without depositions are the secret meetings between the conspirators and the agreement Judge Barron made before the case was filed was to rule against Mr. John. The defendants have all filed affidavits denying that. Depositions and other discovery will show that the meetings took place.

In Milwaukee the District Court has stated that they are just waiting until the appeals are settled to rule on sanctions. Appendix page 21a line 3, line 11, page 23a lines 17-33, page 24a lines 2-4, page 36a lines 24-27, page 38a lines 1-4, page 43a lines 28-32. Furthermore, both judges are close friends. In fact, Milwaukee is a close legal community where the attorneys and courts stick together. Judge Evans is not only a former circuit court judge but Justice Coffey is a former circuit court judge and a devout Catholic who would find it hard to believe that even the church is infiltrated on occasion with people who do not have the highest standards.

In the case of *De Rance v. PaineWebber,* 872 F.2d 1312 (7th Cir. 1989) the Court gave judgment against PaineWebber for over Thirty Million Dollars ($30,000,000.00) when it at the most should have been Eight Million ($8,000,000.00). Mr. John and Mr. Jeffers both attended parts of the trial and talked to the attorneys on both sides and to many of the witnesses. The facts are that Mr. John while President of De Rance deposited with Paul Sarnoff of PaineWebber Eight Million Dollars ($8,000,000.00) to buy gold, and then sell options on it.

Instead, Paul Sarnoff bought options on gold and started churning the account. It was wrong to do that, but the trading should have been monitored by people Mr. John assigned to do the job, but who did not discharge their responsibilities properly. The trial court was so biased it was shocking. It excluded evidence it should have admitted, and when the strongest De Rance witness was on the stand the judge left the bench, and went down and sat by the jurors and looked at the witness as if the witness was the most important and honest witness he had ever heard. He had a tremendous influence on the jurors. The appellate court cut the verdict to approximately Fifteen Million Dollars ($15,000,000.00), but in all fairness, at the most it should have been Eight Million ($8,000,000.00).

Mr. John directed the purchase of a school for the blacks and paid for special educational programs for them which Mr. John did not know until his case was over that Judge Barron was against those programs.

Over Five Million Dollars ($5,000,000.00) of De Rance's money has been spent on attorney's fees since October 5, 1985, when the suit against Mr. John was started. In the writer's opinion, all of that money is unjustified, but the lawyers like it.

Another important factor is that to make Mr. John's change of his power of appointment from the Archdiocese of Milwaukee to another non-profit organization invalid, Judge Barron inferred that Mr. John was insane and should see a psychiatrist. Judge Barron accused Mr. John of tax fraud because he forgot a small investment account in Europe that he had control over for a few months when his accountant asked him if he had any foreign bank accounts and he said no; he accused him of perjury when he could not recall all the details of his spending as President of De Rance which at the time had an income

over Twenty-five Million Dollars ($25,000,000.00) per year; he accused him of securities fraud because he sold his securities on the open market and through an established stock exchange, and at about the same time De Rance purchased the same type of stock (De Rance earned an average of over 22% on its stock transactions).

This has affected Mr. John's credibility, particularly in the case of the discovery of the ship called the Central America which involves a claim to a share of the treasure that has been discovered 160 miles off the coast of North Carolina in 7,500 feet of water. The ship sunk with Four Hundred Fifty Million Dollars ($450,000,000.00) in gold in 1857. The case is in the Federal Court for the Eastern District of Virginia, Norfolk Division, entitled *Columbus America Discovery Group, et al. v. The Unidentified Wrecked and Abandoned Sailing Vessel, et al.,* Case No. 87-363-N.

The wreck and its cargo are an historical, documented fact, as well as its general location. Since the invention of side scan sonar, the magnometer, and remote operated submersible vehicles, the location and recovery of wrecks has been made possible.

Mr. John knew this and hired a scan of the area, located the wreck, and his charts were obtained by subterfuge and used to locate and lay claim to the wreck. That is the subject of the litigation.

This is like the case of a man joining the Army, but not being allowed to fight, and instead being put in front of a firing squad. No one would join the Army under those conditions, just as no one could afford to file a case in the Federal Court with a judge having the power to rule on his own motion that the plaintiff is denied discovery, and

then levy Rule 11 sanctions against him because the judge does not believe his complaint.

Only attorneys from wealthy law firms, with wealthy clients willing to sign an indemnification agreement against Rule 11 sanctions could venture into the Federal Court.

CONCLUSION

For the foregiong reasons Mr. John respectfully reaquests that the Petition for a Writ of Certiorari be granted, and that if a full hearing may not be had, that the case be sent back to the district court so that full discovery may be completed, and that the matter be resolved at the trial court level.

Respectfully submitted,

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June 5, 1990

APPENDIX A

Nos. 89-1027, 89-1112

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

HARRY G. JOHN, et. al.,
Plaintiffs-Appellants,

v.

HONORABLE MICHAEL J. BARRON, et al.,
Defendants-Appellees.

Nos. 89-1848, 89-2510

HARRY G. JOHN, et. al.,
Plaintiffs-Appellants

v.

DONALD A. GALLAGHER, et al.,
Defendants-Appellees.

Appeals from the United States District Court for
the Eastern District of Wisconsin.
Nos. 87 C 953, 88 C 340, 88 C 489
Terence T. Evans, *Judge,* and **Robert W. Warren,**
Chief Judge.

Submitted February 13, 1990* — Decided March 8, 1990

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*After preliminary examination of the briefs, the Court notified the parties that it had tentatively concluded that oral argument would not be helpful to the Court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." Plaintiffs-appellants have filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

Before CUMMINGS, WOOD, and COFFEY, *Circuit Judges*. CUMMINGS, *Circuit Judge*. These are consolidated appeals arising from state court litigation involving the removal of a trustee from a charitable trust.

I. BACKGROUND

In 1946 Harry John established De Rance, Inc. as a foundation to fund various religious, charitable, and educational programs. By 1954 John had turned over to De Rance much of his inheritance, which consisted of a 47% stake in the Miller Brewing Company. Over the years, De Rance contributed over $100 million to primarily Catholic charities out of income from its investments.

De Rance had three trustees: Harry John, his now ex-wife Erica John, and Dr. Donald Gallagher. Both Erica and Gallagher are defendants-appellees. Having been warned that De Rance was teetering on bankruptcy, they filed suit in Wisconsin state court on October 5, 1984, in order to remove John as an officer, director, and trustee. They alleged that the foundation, at John's direction, had spent nearly $100 million of its capital in less than one year to fulfil John's dream of creating a world-wide Catholic television network and to fund deep-sea treasure hunts.

After a lengthy bench trial, Circuit Court Judge Michael Barron, another defendant-appellee, issued an oral decision on August 21, 1986, which removed John as trustee and director of De Rance. Judge Barron found that John's mis-conduct included securities fraud, tax fraud, perjury self-dealing, conflicts of interests, and waste. Judge Barron also dismissed John's conspiracy counterclaim against Erica, Gallagher, and other to oust Harry John from De Rance. The Wisconsin Court of Appeals Judge Barron's decision, see *John v. John*, No.

88-1507 (Wis. Ct. App. Nov. 24, 1989), and the Wisconsin Supreme Court denied a petition for review. See *John v. John*, No. 88-1507 (Wis. Feb. 20, 1990).

Following the Wisconsin trial court decision, John filed three lawsuits in district court. These suits are the subject of this consolidated appeal. In *John v. Barron*, No. 89-1112 *(Barron I)*, John contests the imposition of sanctions under Rule 11 of the Federal Rules of Civil Procedure, arising out of allegations in a complaint filed pursuant to 42 U.S.C. § 1983 which he later dismissed. The next two appeals arise out of a subsequently filed § 1983 case against the same defendants. In *John v. Barron*, No. 89-1027 *(Barron II)*, John appeals from an order dismissing the state court judge as a defendant, and in *John v. Gallagher*, No. 89-2510 *(Gallagher I)*, John appeals from a subsequent order granting summary judgment to the remaining defendants. In *John v. Gallagher*, No. 89-1848 *(Gallagher II)*, John appeals from an order dismissing his complaint in a diversity suit against Erica and Gallagher under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

II. ANALYSIS

Rule 11 Sanctions

In *Barron I*, No. 89-1112, Judge Warren sanctioned both John and his attorney, Thomas Jeffers, $1000 each and imposed joint and several liability for the defendants' attorneys' fees pursuant to Rule 11 due to the scandalous nature of the allegations in the complaint and their failure to make a reasonable inquiry into the facts. Judge Warren then transferred the determination of the amount of attorneys' fees to Judge Evans, before whom Rule 11 sanctions were pending in a nearly identical suit brought by John. (See *Barron II*). John's complaint in the subse-

quent case has now been dismissed, but Judge Evans has not yet determined the amount of attorneys' fees.

A. Appellate Jurisdiction

The first issue in *Barron I* is whether this court has subject matter jurisdiction to consider the awarding of attorneys' fees pursuant to Rule 11 when the amount of the fees has yet to be quantified by the district court. An award of attorneys' fees which does not fix the amount of the award or specify a formula allowing the amount to be computed is not a final decision within the meaning of 28 U.S.C. § 1291. *Lac Courte Oreilles Chippewa Ind. v. Wisconsin*, 829 F.2d 601, 603 (7th Cir. 1987); *Vandenplas v. City of Muskego*, 797 F.2d 425, 427-428 (7th Cir. 1986); *Gilles v. Burton Constr. Co.*, 736 F.2d 1142, 1145-1146 (7th Cir. 1984); *Hershinow v. Bonamarte*, 735 F.2d 264, 266-267 (7th Cir. 1984); see also *In re Ronco, Inc.*, 838 F.2d 212, 213-214 n.1 (7th Cir. 1988). There is an exception when the order awarding fees in an amount not yet determined can be consolidated on appeal with a final order. See *Lac Courte*, 829 F.2d at 603. That exception does not apply in this case because John does not appeal from any final order regarding the underlying complaint. Judge Warren's order does not conclusively determine the disputed question of attorneys' fees, and that portion of the appeal must be dismissed.

B. Reasonable Inquiry into the Facts

Judge Warren's order imposing monetary sanctions is a final appealable order, and we must determine whether the district court properly imposed sanctions on John and Jeffers in the amount of $1000 each. Judge Warren found that they failed to make reasonable inquiries into the facts underlying the complaint before filing suit. We agree.

The standard for reviewing decisions under Rule 11 is now settled in this circuit. In *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989) (*en banc*), we adopted a deferential standard in reviewing a district court's decision to impose sanctions under Rule 11. *Id.* at 933. Because the trial court has an intimate familiarity with the relevant proceedings, its decision whether counsel has conducted the kind of inquiry required by Rule 11 and taken a position reasonable in light of the facts and governing law is reviewable only where there has been an abuse of discretion. *Id.* (quoting *R. K. Harp Inv. Corp. v. McQuade*, 825 F.2d 1101, 1103 (7th Cir. 1987); *Melrose v. Shearson/American Express*, No. 88-2008, slip op. at 11 (7th Cir. Feb. 8, 1990).

Judge Warren was disturbed by the outlandish nature of the complaint, which challenged the credibility of the entire Wisconsin legal system.[1]

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[1]In his order imposing Rule 11 sanctions, Judge Warren noted the following allegations in the complaint:

> (1) Erica John, Donald Gallagher, Thomas Cannon, William Cannon, retired Judge Robert Cannon and Judge Barron held secret meetings, whereat Judge Barron agreed, prior to the filing of *John v. John*, that he would sign an *ex parte* order removing Harry John from De Rance. "This was done to destroy HARRY G. JOHN financially and professionally, to destroy his reputation and completely ruin forever his standing in the community (community here, meaning the world, for he was a world figure)." [Complaint at para. 4].
>
> (2) By prior arrangement and as part of the conspiracy, the County Clerk's Office assigned the *John v. John* case to Judge Barron. [Complaint at para. 5].
>
> (3) Judge Barron arranged for the *John v. John* case to be assigned to him so that he could rule against John "no matter what the evidence showed." [Complaint at 27].

He ordered John and Jeffers to submit a documented summary of the factual and legal inquiry made by each prior to the filing of the lawsuit. John said that he filed the suit at the advice of his attorney. Jeffers said that his investigation consisted of sitting through the state court proceeding, reviewing the financial history of De Rance, and talking to people who knew the parties. Regarding Judge Barron, Jeffers stated that he spoke with two Circuit Court judges who said that they knew Judge Barron would rule against John. The role of the Circuit Court Clerk's Office was revealed to Jeffers by the fact that the clerk held up the assignment of more than 50 cases so that Erica's and Gallagher's case could be assigned to Judge Barron. Jeffers also stated, "[t]he above information is the tip of the iceberg. There is other material which is confidential, however, it will be available at the time of trial." *John v. Barron*, No. 87 C 953 order at 6 (E.D. Wis. Dec. 15, 1988) (*Barron I* order) (quoting Jeffers' summary at 26).

Judge Warren found that John and Jeffers provided no documentation of the alleged conspiratorial meetings and agreements, the role of the Clerk's office, or the futility of presenting a case to the Wisconsin Court of Appeals. John's statement that he relied on evidence known by Jeffers conflicted with his sworn statement accompanying the complaint regarding his personal knowledge of the facts. Jeffers' "rambling submission was hardly responsive to the court order and raised further unsupported allegations." *Barron I* order at 7. Judge Warren called the

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(4) Harry John could not appeal the state court proceedings because the Wisconsin "Court of Appeals is very close to JUDGE MICHAEL J. BARRON and their offices are in the same building, and within a few feet of each other, and the Court of Appeals will do what it can to protect JUDGE BARRONS (sic) and his order." [Complaint at 41].

complaint "one of the most outlandish and blatant violations of Rule 11 that this court has seen" including "allegations made by *pro se* plaintiffs." *Id.* at 8. Our review of the record supports Judge Warren's conclusion. The district court did not abuse its discretion in imposing sanctions on both John and Jeffers.

Judicial Immunity

The issue in *Barron II*, No. 89-1027, is whether the doctrine of judicial immunity shields a state court judge from liability for damages for alleged deprivation of John's constitutional rights to a fair trial as guaranteed by the due process clause of the Fourteenth Amendment.[2] John claims that Judge Barron violated his civil rights by conspiring with others to remove him as a trustee of De Rance before and during the state court trial. John argues that judicial immunity is inapplicable to this case because Judge Barron entered the conspiracy prior to the time the state court had personal jurisdiction over him.

Judges are not liable in civil actions for their judicial acts unless they have acted in the clear absence of all jurisdiction. *Stump v. Sparkman*, 435 U.S. 349, 356-357 (1978) (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871)); *Dellenbach v. Letsinger*, 889 F.2d 755, 758 (7th

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[2]After dismissing the claim for damages against Judge Barron, Judge Evans denied John's request for injunctive relief based on the theory of abstention. John has waived this issue on appeal by failing to address abstention in his appellate brief. *Beard v. Whitley County REMC*, 840 F.2d 405, 408-409 (7th Cir. 1988) (Fed. R. App. P. 28(a)(4) mandates that an appellant must present in its brief the issues to the appellate court that the appellant desires to litigate).

John also raises several other issues which this court need not address due to our disposition of this case.

Cir. 1989); *Eades v. Sterlinske*, 810 F.2d 723, 725 (7th Cir.), *cert. denied*, 484 U.S. 847. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority. *Stump*, 435 U.S. at 356-357 (quoting *Bradley*, 80 U.S. (13 Wall.) at 351); *Dellenbach*, 889 F.2d at 758. Furthermore, a judge is absolutely immune for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors. *Stump*, 435 U.S. at 359; *Dellenbach*, 889 F.2d at 759. Judge Barron will be entitled to absolute judicial immunity if his actions meet a two-part test: first, the acts must be within the judge's jurisdiction; second, these acts must be performed in the judge's judicial capacity. *Id.* (citing *Stump*, 435 U.S. at 356, 360; *Bradley*, 80 U.S. (13 Wall.) at 351-352)).

To support his argument that Judge Barron acted in the absence of jurisdiction, John relies on *Rankin v. Howard*, 633 F.2d 844 (9th Cir.), *cert. denied*, 451 U.S. 739, in which the court held that a judge's private, prior agreement to decide in favor of one party was not a judicial act giving rise to judicial immunity. *Id.* at 848-849. In *Ashelman v. Pope*, 793 F.2d 1072 (9th Cir. 1986), the Ninth Circuit overruled *Rankin*, holding that a judge is entitled to immunity even if there was no personal jurisdiction over the complaining party at the time the judge entered the conspiracy. *Ashelman*, 793 F.2d at 1078. Judicial immunity is a defense so long as the judge's ultimate acts are judicial actions taken within the court's subject matter jurisdiction. *Id.*; *New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298, 1302 (9th Cir. 1989). We agree with the reasoning of the *Ashelman* court, because under *Rankin*, judges, on mere allegations of conspriacy, could be hauled into court and made to defend their judicial acts, the precise result that judicial

immunity was designed to avoid. *Ashelman*, 793 F.2d at 1077.

Judge Barron's acts during the pendency of the case were within the subject matter jurisdiction of a circuit court of the State of Wisconsin. The Wisconsin Constitution provides that "the circuit court shall have original jurisdiction in all matters civil. . . ." Wis. Const. Art. 7, § 8. As a judge of the circuit court, Judge Barron did not act "in the clear absence of jurisdiction" with respect to the events that occurred during the pendency of Erica's and Gallagher's civil case.

Next we must determine whether Judge Barron performed these acts within his judicial capacity. The factors which determine whether an act by a judge is a judicial one relate to whether the act is normally performed by a judge and whether the parties dealt with the judge in his judicial capacity. *Stump*, 435 U.S. at 362; *Dellenbach*, 889 F.2d at 760; *Eades*, 810 F.2d at 725-726. Unlike a judge who fires a court employee, see *Forrester v. White*, 484 U.S. 219, 229 (1988), a judge who assigns a case, considers pretrial matters, and renders a decision acts well within his or her judicial capacity. Because Judge Barron acted within the scope of his jurisdiction, and the acts were within his judicial capacity, he is entitled to absolute judicial immunity. Further John should have addressed any complaint he had regarding Judge Barron's handling of the case to the state appellate court. See *Forrester*, 484 U.S. at 227 ("[m]ost judicial mistakes or wrongs ware open to correction through ordinary mechanisms for review, which are largely free of the harmful side-effects inevitably associated with exposing judges to personal liability."). Therefore the district court properly dismissed Judge Barron from the case under Rule 12(b)(6). See *Williams v. Faulkner*, 837 F.2d 304, 307 n.5 (7th

Cir.), *aff'd sub nom. Neitzke v. Williams,* 491 U.S. ____, 109 S. Ct. 1827 (Rule 12(b)(6) is applicable when the defendants are clearly immune from suit).

Adequacy of Appellant's Brief

The only issue we address in *Gallagher I,* No. 89-2510, and *Gallagher II,* No. 89-1848, is whether we should dismiss these appeals due to the inadequacy of the appellants' briefs. In *Gallagher I,* John argues that the district court erred in granting summary judgment to the defendants other than Judge Barron. The argument section of Harry John's brief consists of two brief paragraphs which read as follows:

> Plaintiff Appellant should be permitted to maintain this action because Judge Barron entered into a conspiracy with the other defendants to deprive Mr. John of his constitutional rights and acted under color of state law.
>
> In the case of Dennis v. Sparks[,] 449 U.S. 24, the court ruled that private persons, jointly engaged with the state officials in a challenged action, are acting "under color of law" for purposes of 1983 actions, and the case could proceed even though the judge was immune and the judge could be required to testify in the proceedings.

These two paragraphs are followed by one page entitled "Proof of Conspiracy" which includes a lengthy quote from a book, and a separate reference to one case, all without commentary. Defendants have moved that this appeal be dismissed due to the inadequacy of the brief.

In *Gallagher II,* John argues that he was denined a hearing on a dismissal and was not given the opportunity

to amend his complaint. The argument section of John's brief on appeal reads as follows:

> Should the Plaintiff be able to maintain this suit for the removal of Donald Gallagher and Erica John?
>
> Plaintiff states that he should be able to maintain the action against them on the following theories:
>
> 1. That he can maintain the suit on the basic principle of equity as the defendants maintain a majority vote as directors, and have so voted. Donald Gallagher cannot be removed as a trustee because a trustee is merely a voting member and has no power to bind the corporation other than changing the articles and bylaws. Section 776.32 of Wisconsin General Laws also gives that power. The state court was wrong in removing Harry John as a trustee for this same reason.
>
> 2. He can maintain the action as the Founder and sole contributor of the funds to De Rance.
>
> 3. He is the holder of the power of appointment and as such holder can sue to protect it.
>
> 4. It is possible that he could act as a private attorney general where the Wisconsin Attorney General willl not act.
>
> 5. The action could be re-instated with a stay order opending a favorable ruling on [*Gallagher I*] and then have this action joined with that action.

The entire 'Argument' section of this brief consists of one page which fails to cite a statute, rule, case or any authority, except for an incorrect reference to a Wisconsin statute. The defendants have moved to dismiss the appeal as frivolous, citing *Brooks v. Allison Div. of General Motors Corp.*, 874 F.2d 489, 490 (7th Cir. 1989).

Rule 28(a)(4) of the Federal Rules of Appellate Procedure requires that the appellant's argument "contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." Rule 28(a)(4) plainly requires more than a one page argument unsupported by any authority. See *Bob Willow Motors, Inc. v. General Motors Corp.*, 872 F.2d 788, 795 (7th Cir. 1989); *Sere v. Board of Trustees*, 852 F.2d 285, 287-288 (7th Cir. 1988). An appellant must not only raise issues in his brief, he must present them in a professional fashion. See *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1025-1026 (7th Cir. 1988). This court is not obligated to research and construct legal arguments open to parties, especially when they are represented by counsel as in this case. See *Zelazny v. Lyng*, 853 F.2d 540, 542 n.1 (7th Cir. 1988) quoting *Beard v. Whitley Country REMC*, 840 F.2d 405, 408 (7th Cir. 1988)); *Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cir.), *cert. denied*, 479 U.S. 1056. In *Pearce v. Sullivan*, 871 F.2d 61 (7th Cir. 1989), we warned that one day the penalty for a perfunctory appeal could be dismissal of the appeal. *Id.* at 64. That day has arrived. Appellant counsel Thomas Jeffers' conclusory remarks without any attempt at argument do not comply with the strictures of Rule 28(a)(4). Due to the perfunctory and frivolous nature of these appeals, they must be dismissed. See *Crowley Cutlery Co. v. United States*, 849 F.2d 273, 276-278 (7th Cir. 1988).

We are deeply troubled by the performance of Jeffers in this appeal. The results in all of these cases were obvious and Jeffers' arguments were wholly without merit. Not only did he violate Rule 28(a)(4), but in all four cases he failed to comply with Federal Rule of Appellate Procedure 28(a)(3) and (e), which require specific references to the record on appeal. Further, Jeffers constantly mis-

represented the facts, and injected argument into his discussions of the facts. In *Barron II,* Jeffers relied on *Rankin,* a case which has been overruled and repeatedly rejected. See *Ashelman,* 793 F.2d at 1077-1078; *Dykes v. Hosemann,* 776 F.2d 942, 946 (11th Cir. 1985) (*en banc*); *Holloway v. Walker,* 765 F.2d 517, 522-523 (5th Cir.), *cert. denied,* 474 U.S. 1037. As a result of his performance, we are sending a copy of this decision to the appropriate attorney disciplinary committee in Jeffers' home state.[3]

III. CONCLUSION

In summary, we affirm in part and dismiss in part for lack of appellate jurisdiction the appeal in *Barron I,* No. 89-1112. In *Barron II,* No. 89-1027, we affirm the decision of the district court dismissing Judge Barron. In *Gallagher I,* No. 89-2510, and in *Gallagher II,* No. 89-1848, we dismiss due to the frivolous nature of the appeals.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

---

[3]Defendants' motion for sanctions under Rule 38 of the Federal Rules of Appellate Procedure is denied in lieu of this action.

APPENDIX B

CASE NO. 87-C-0953

Copy mailed to attorneys for parties by the Court pursuant to Rule 77(d) Federal Rules of Civil Procedures.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

HARRY G. JOHN,
Plaintiff,

v.

THE HONORABLE MICHAEL J. BARRON, individually and in his official capacity as Judge of the Circuit Court of Milwaukee County, State of Wisconsin; DONALD A. GALLAGHER; ERICA P. JOHN; WILLIAM CANNON; THOMAS CANNON; DOES I through XX, inclusive,
Defendants.

Filed
December 15, 1988
Sofron B. Nedilsky, Clerk

DECISION AND ORDER

Plaintiff Harry John, with his attorney Thomas Jeffers, filed a suit in this Court claiming a conspiracy surrounding the state court proceeding *John v. John* and involving a state court judge, the prevailing parties, their attorneys, and others. The 28-page complaint, which was voluntarily dismissed six days after it was filed, impugns the character and reputation of all named defendants, as well as several other persons not named as defendants. The suit also challenges the credibility of the entire Wisconsin legal system. Because of the outlandish nature of many of

the allegations in the complaint and because plaintiff and his attorney have failed to establish that they made a reasonable inquiry to determine that those allegations were well-grounded in fact, the Court imposes sanctions under Rule 11 of the Federal Rules of Civil Procedure.

I. BACKGROUND

On August 18, 1987, plaintiff Harry John filed a complaint in this Court titled, "Complaint for Injunction and Declaratory Relief of the Enforcement of a State Court Judgment on the Grounds of Bias of State Court Judge; and Denial of Plaintiff's Constitutional Rights, 42 U.S.C. section 1983, 28 U.S.C. section 1343 Court Acting in Excess of Its Jurisdiction; and for Damages." The suit alleged a conspiracy surrounding the Wisconsin state court proceeding *John v. John,* No. 650-555, Milwaukee County Circuit Court, and named as defendants Milwaukee County Circuit Court Judge Michael J. Barron, Donald A. Gallagher, Erica P. John, William Cannon, Thomas Cannon, and Does I through XX, inclusive. Harry John was founder and one of three directors of De Rance, Inc., a private foundation which was the subject of the state court proceeding; Donald Gallagher and Erica P. John (Harry John's ex-wife) were the other two directors of De Rance and filed the state court action; Thomas Cannon and William Cannon were attorneys for Gallagher and Erica John; Judge Barron was the presiding judge. The complaint sought, *inter alia,* an injunction preventing enforcement of the state court judgment and an order returning Harry John to his position as Trustee, Director and President and Treasurer of De Rance, as well as awarding special, general and punitive damages. The complaint was signed by Attorney Jeffers. Also attached

to the complaint was the following signed statement of Harry John:

> Harry G. John, being sworn, states that he has knowledge of the facts pleaded in the foregoing Complaint and that those facts are true, and as to those matters which are therein stated upon information or belief, and as to those matters he believes it to be true. [sic]

Among the allegations in the complaint were the following:

> (1) Erica John, Donald Gallagher, Thomas Cannon, William Cannon, retired Judge Robert C. Cannon and Judge Barron held secret meetings, whereat Judge Barron agreed prior to the filing of the John v. John lawsuit that he would sign an ex parte order removing Harry John from De Rance. "This was done to destroy HARRY S. JOHN financially and professionally, to destroy his reputation and completely ruin forever his standing in the community (community here, meaning the world, for he was a world figure)." [Complaint at para. 4].
>
> (2) By prior arrangement and as part of the conspiracy, the County Clerk's Office assigned the *John v. John* case to Judge Barron. [Complaint at 5].
>
> (3) Judge Barron arranged for the *John v. John* case to be assigned to him so that he could rule against Harry John "no matter what the evidence showed." [Complaint at 27].
>
> (4) Harry John could not appeal the state court proceeding because the Wisconsin "Court of Appeals is very close to JUDGE MICHAEL J. BARRON and their offices are in the same building, and within a few feet of each other, and the Court of Appeals will

> do what it can to protect JUDGE BARRONS and his orders." [Complaint at 41].

See also allegations discussed in *Decision and Order* dated June 6, 1988.

Six days after the filing of the complaint, Harry John gave notice of voluntary dismissal and the case was dismissed. Following the dismissal of the case, counsel for various defendants filed a motion for sanctions and other relief under Rule 11, Fed.R.Civ.P. In an *Order* dated August 28, 1987, this Court established a two-step inquiry for the motion: first, whether it was appropriate for Mr. John and his counsel to disclose the nature of the inquiry each made into the factual and legal allegations contained in the complaint; and second, assuming disclosure is ordered, whether sanctions were appropriate.

Following extensive briefing by the parties, the Court, in a *Decision and Order* dated June 6, 1988, found the allegations of the complaint nothing short of scandalous. The Court ordered Mr. John and Attorney Jeffers to submit to the Court a documented summary of the factual and legal inquiry made by each prior to the filing of the lawsuit. Those summaries have since been submitted.

II. DISCUSSION

A. Submissions of Harry John and Attorney Jeffers

In response to the Court's order, Harry John incorporated an affidavit that had been previously filed. The affidavit, dated October 28, 1987, stated in part that John filed the complaint based on the results of the *John v. John* proceeding and after consulting with various attorneys. (Affidavit at para. 9-14). He also said he filed the federal

claim on the advice of Attorney Jeffers. (Affidavit at 15). The affidavit added:

> With respect to the specific allegations in the complaint I believe them all to be true and relied upon Attorney Jeffers' investigation and legal judgment. As to the assertions therein concerning meetings between individuals before, during and after the case [of *John v. John*] and some other facts, such as the way Judge Barron was picked as judge in the case, I was advised by Attorney Jeffers that he had evidence of such meetings and the manner of the selection of Judge Barren but did not disclose to me his sources. I understand that some of the assertions were based upon circumstantial evidence deriving from facts revealed before, during, and after trial. (*Id.*)

Attorney Jeffers submitted a 60-page summary of his purported factual and legal inquiry. His factual investigation consisted of sitting through the entire state court proceeding, reviewing the financial history of the De Rance foundation and talking to people who knew the principals of the parties. As to Judge Barron, Attorney Jeffers states that he spoke with two Milwaukee County Circuit Judges and that the two knew Judge Barron would rule against Harry John. Attorney Jeffers states that the role of the Circuit Court Clerk's Office was revealed by the fact that the clerk held up the assignment of more than 50 cases so that *John v. John* could be assigned to Judge Barron. (*Id.* at 21). Atttorney Jeffers also stated in his summary:

> The above information is the tip of the iceberg. There is other material which is confidential, however, it will be available at the time of trial.

(Attorney Jeffers' summary at page 26).

B. Evaluation of the Summaries

The summaries of Harry John and Attorney Jeffers do not establish a reasonable inquiry into the factual basis of many of the allegations of the complaint. In particular, they do not establish a reasonable inquiry into the alleged conspiracy involving Judge Barron, Erica John, Gallagher and the two Cannons. No documentation whatsoever is given for the alleged meetings and agreements which took place. There also is no documentation of the inquiry into the role of the state court clerk's office, nor is there documentation on the futility of presenting a case to the Wisconsin Court of Appeals. At best, the submissions establish that Harry John and Attorney Jeffers were outraged at the legal determinations made by Judge Barron and believed that Judge Barron's rulings were not supported by the law and may have infringed Harry John's constitutional rights. But it is a tremendous leap of logic to take those supposed legal errors and infer from them a conspiracy involving the judge and the principals of the case. At worst, the submissions are self-defeating. Harry John's affidavit states that he relied on evidence known by Attorney Jeffers. But that statement conflicts with the sworn statement that accompanied the complaint. Attorney Jeffers' rambling submission was hardly responsive to the Court's order and raised further unsupported allegations that the Court finds improper. In particular, the Court notes that the comments of Attorney Jeffers at page 25 of his submission imply that Judge Barron was soliciting a bribe from Attorney Jeffers when he made a remark about wishing he had $500,000.

In sum, the Court finds that applying on objective standard of "reasonableness under the circumstances," *see Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 205 (7th Cir. 1985), Harry John and Attorney Jeffers

failed to perform a reasonable inquiry into the factual allegations of the complaint filed August 18, 1987. As such, both are in violation of Rule 11 and it is the duty of this Court to impose appropriate sanctions.

C. Sanctions

Again, the allegations of the complaint are nothing short of scandalous. The integrity of the defendants and other individuals is impugned and the credibility of the Wisconsin legal system is attacked — all with no justification other than the fact that Harry John and Attorney Jeffers were not satisfied with rulings of Judge Barron in a Milwaukee County Circuit Court. While the filing of the voluntary dismissal under Rule 41, Fed.R.Civ.P., may serve to mitigate sanctions, it does not absolve the party and counsel. The obligation under Rule 11 to answer for an act accompanies the act. *Szabo Food Service, Inc. v. Canteen Corporation*, 823 F.2d 1073, 1079 (7th Cir. 1987). Furthermore, the parties have informed the Court that the complaint at issue was refiled and the new case is now pending before Judge Terence T. Evans of this district.

The case before the Court presents one of the most outlandish and blatant violations of Rule 11 that this Court has seen during its time on the bench and that includes allegations made by *pro se* plaintiffs unaware of their responsibilities under Rule 11. To allow such behavior to go unpunished would diminish the entire legal system and would encourage the use of federal courts for the unsubstantiated allegations of every disgruntled party that ends up on the losing side of a state court proceeding. As remarked by Judge Evans in a case which also challenged the integrity of the Wisconsin Court of Appeals, it is an example of the kind of lawyering that brings the legal system into disrepute. *See McBounds v.*

Murphy, Case No. 87-C-965, Slip Op. at 18 (E.D.Wis. June 30, 1988).

Accordingly, the Court feels stiff sanctions are in order. The Court hereby ORDERS as follows:

1. Harry John and Attorney Jeffers are sanctioned $1,000 each. Harry John shall not reimburse his counsel for the amount of counsel's $1,000 sanction. The payments are to be made to the Clerk of Court of this District for use in the District's *pro bono* fund and shall be made within 30 days of the date of this decision.

2. Harry John and Attorney Jeffers, jointly and severally, shall be liable to defendants for the reasonable attorneys' fees and costs incurred in the filing of their Rule 11 motion. Counsel for defendants shall submit to the Court within 30 days of this decision affidavits detailing their work expended on the Rule 11 motion in this case.

3. Pursuant to Local Rule 2.05 (E.D.Wis.), Attorney Jeffers shall show cause before this Court on *Tuesday, January 24, 1989, at 9:00 a.m.*, in Room 390, Federal Building, 517 East Wisconsin Avenue, Milwaukee, Wisconsin, as to why he should not be suspended from practice in the United States District Court for the Eastern District of Wisconsin for a period of six (6) months.

SO ORDERED this 15th day of December, 1988, at Milwaukee, Wisconsin.

ROBERT W. WARREN

Robert W. Warren
United States District Judge

APPENDIX C

Case No. 87-C-0953

Copy mailed to attorneys for parties by the Court pursuant to Rule 77(d) Federal Rules of Civil Procedures.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

HARRY G. JOHN,
Plaintiff,
v.
THE HONORABLE MICHAEL J. BARRON, individually and in his official capacity as Judge of the Circuit Court of Milwaukee County, State of Wisconsin; DONALD A. GALLAGHER; ERICA P. JOHN; WILLIAM CANNON; THOMAS CANNON; DOES 1 through XX, Inclusive,
Defendants.

Filed
March 17, 1989
SOFRON B. NEDILSKY, Clerk

DECISION AND ORDER

In a *Decision and Order* dated December 15, 1988, the Court imposed sanctions against plaintiff and his counsel for violations of Rule 11 of the Federal Rules of Civil Procedure. The Court sanctioned plaintiff and his attorney $1,000 each and imposed joint and several liability for defendants reasonable attorney's fees in filing the Rule 11 motion. Plaintiff's counsel, Attorney Thomas J. Jeffers, also was ordered to show cause under Local Rule 2.05 (E.D.Wis.) as to why he should not be suspended from practice in the United States District Court for the Eastern District of Wisconsin. A notice of appeal was subsequently filed. Also filed were affidavits from defend-

ants' counsel listing more than $30,000 in attorney's fees. On February 24, 1989, the Court heard argument from Attorney Jeffers on why he should not be suspended.

Based on the record of the case as it now stands, the Court makes the following points.

1. Attorney Jeffers' argument persuaded the Court that he did not proceed in bad faith. Rather, he proceeded on a misplaced belief in a conspiracy that he cannot prove. The Court, however, notes that the Rule 11 standard is an objective one, *see Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 205 (7th Cir. 1985), and on that basis the Court would stand by its previous finding that sanctions of $1,000 each for plaintiff and his counsel are appropriate.

2. The lack of bad faith on the part of Attorney Jeffers would lead the Court to mitigate the previous sanctions by discontinued proceedings to suspend Attorney Jeffers.

3. Defense counsels' combined attorney's fees of more than $30,000 seems excessively high given the Court's understanding of the case. Furthermore, the Court questions whether much of the documented work was not duplication of the work for the case between the same parties proceeding before Judge Terence T. Evans. This Court would not include as part of its Rule 11 award attorney's fees on work that was subsequently used in the litigation before Judge Evans since that work would have had to be done regardless of plaintiff's baseless filing in this Court.

4. In light of the continuing nature of the case before Judge Evans, the Court would be inclined to transfer this case to Judge Evans for consideration of the award of reasonable attorney's fees. Judge Evans simply is in a

better position to determine whether certain work was duplication.

Therefore, this Court hereby DISCONTINUES proceedings to suspend Attorney Jeffers and hereby TRANSFERS this case to Judge Evans for determination of an award of reasonable attorneys fees.

SO ORDERED this 17th day of March, 1989, at Milwaukee, Wisconsin.

ROBERT W. WARREN

Robert W. Warren
United States District Judge

APPENDIX D

Civil Action No. 88-C-340

Copy mailed to attorneys for
parties by the Court pursuant
to Rule 77(d) Federal Rules
of Civil Procedures.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

HARRY G. JOHN, as an individual;
HARRY G. JOHN, as a Trustee, Director and Officer of DE RANCE, INC., and as a Director of SANTA FE COMMUNICATIONS; DE RANCE, INC., through its Founder and Sole Contributor, HARRY G. JOHN; and SANTA FE COMMUNICATIONS, through its Founder, HARRY G. JOHN, in a derivative capacity,
Plaintiffs,

v.

THE HONORABLE MICHAEL J. BARRON, individually and in his official capacity as Judge of the Circuit Court of Milwaukee County, State of Wisconsin; DONALD A. GALLAGHER; IDELLA GALLAGHER; ERICA P. JOHN; WILLIAM CANNON; THOMAS CANNON; and DOES I through XX, inclusive,
Defendants.

Filed
December 15, 1988
SOFRON B. NEDILSKY, Clerk

DECISION AND ORDER

This is an action for injunctive relief and damages pursuant to 42 U.S.C. § 1983. Numerous motions are pending. Also, oral argument has been requested on the pending motions. Because I don't think oral argument would be helpful, the request for it is DENIED.

Plaintiff Harry G. John, an heir to the Miller Brewing Company fortune, founded De Rance, Inc., a private foundation, in 1946. In 1982, Santa Fe Communications, Inc., was established by the De Rance board of directors. The boards of directors of both corporations were Harry G. John, Donald A. Gallagher, and Erica P. John, Harry John's then-wife. Through the De Rance Foundation millions of dollars were distributed to Catholic charities throughout the world.

On October 5, 1984, Erica John and Donald Gallagher, who are both defendants to this suit, filed an action in the Milwaukee County circuit court, claiming that Santa Fe and De Rance were nearing bankruptcy. The suit sought an order removing Harry John from his office as a director, trustee, and officer of the corporations. Erica John and Donald Gallagher were represented by attorneys Thomas and William Cannon, also defendants here. The case was assigned to Milwaukee Circuit Court Judge Michael J. Barron, who is now a defendant as well.

Following a lengthy trial, on August 21, 1986, Judge Barron announced his decision. He found for the plaintiffs Erica John and Donald Gallagher and enjoined Harry John from participating in his positions as trustee and director of the De Rance Foundation.

Harry John filed a lawsuit in federal court. It was assigned to Judge Robert W. Warren. That suit was subsequently voluntarily dismissed. However, motions filed seeking sanctions pursuant to rule 11 of the Federal Rules of Civil Procedure in that case are being decided today by Judge Warren.

On March 30, 1988, Mr. John filed his suit, which was assigned to me and which is the subject of this decision. Mr. John contends that through the state court action, the

defendants, Judge Barron, the Cannon brothers, Erica John, Donald Gallagher, and his wife Idella, conspired to deprive him of his constitutional rights.

Various defendants have filed motions; currently pending are the following:

> The motion of the Cannon defendants, the Gallagher defendants, and Erica John to dismiss defendants "Does I through XX, inclusive;"
>
> the motion of the same defendants to strike and recast the identification of the plaintiffs;
>
> the motion of the same defendants to dismiss claims for equitable relief and derivative claims;
>
> the motion of Judge Barron for abstention and the consequent dismissal of the action without prejudice;
>
> the motion of Judge Barron for dismissal of the action based on various grounds including judicial immunity;
>
> the motion of Judge Barron for an order striking the complaint;
>
> the motion of Judge Barron to dismiss the action as brought by De Rance, Inc. and Santa Fe Communications; and
>
> lastly, various motions for sanctions pursuant to rule 11 of the Federal Rules of Civil Procedure.

The complaint here is troublesome, both because of its tone and because it is considerably off center from a legal perspective.

Sometimes the allegations are simply ridiculous. For instance, Mr. John alleges in paragraph 16 that:

> IDELLA GALLAGHER is the wife of DONALD A. GALLAGHER, and was, at all times stated herein an Officer of De Rance, Inc. and *the one who actually makes the decisions for Donald A. Gallagher even though she does not hold Office as Director or Trustee, and is fully responsible for the acts of Donald A. Gallagher, and others.* [Emphasis added.]

Is one to understand from this paragraph that Mr. John is in possession of knowledge that Idella Gallagher makes Donald Gallagher's decisions? Will Donald testify to that? More importantly, under what legal theory is Idella Gallagher responsible for her husband's acts, to say nothing of her being responsible for the acts of "others." Another ridiculous act is the naming of "Does defendants I through XX."

The fact that attorney Thomas J. Jeffers represents Harry John but not the corporate plaintiffs is also a problem. Corporations, of course, cannot be *pro se* plaintiffs. Defendants point out that if this is intended to be a derivative suit, then Mr. John must comply with the requirements of rule 23.1 of the Federal Rules of Civil Procedure. Attorney Jeffers states that he can amend the complaint to correct the problems if that is necessary. The suit on behalf of the corporate plaintiffs is dismissed without prejudice.

However, these relatively minor matters are not the only problems with the complaint. Defendants, claiming certain allegations are scurrilous, have filed motions pursuant to rule 11, motions which they say are more properly considered after the case is completed. I agree. Those motions will be considered at a later time.

However, even now, in considering the motions to dismiss some of the claims and various parties, I think it is important to note the nature of the allegations in the complaint and the cavalier manner in which extremely serious charges are made against the defendants, and against persons and institutions not even named as defendants, such as the Wisconsin Court of Appeals. Paragraph 25 states:

> ERICA P. JOHN consulted attorney THOMAS CANNON many months before October 5, 1984, with regard to his representing her. THOMAS CANNON was a teacher at Marquette University, and had a small law practice in his home, having no formal office. He saw an opportunity to gain control of De Rance. THOMAS CANNON strongly felt that he could control ERICA P. JOHN as she had a strong hatred for her husband, HARRY G. JOHN, and wanted him destroyed. THOMAS CANNON enlisted the services of his brother, WILLIAM CANNON.

Paragraph 27:

> Prior to October 1984, various meetings were held by THOMAS CANNON, WILLIAM CANNON, ERICA P. JOHN, DONALD A. GALLAGHER (through their attorneys; and agents, and conspirators) and JUDGE MICHAEL BARRON, wherein JUDGE BARRON agreed in advance to join the conspiracy, and that when a suit was filed against HARRY G. JOHN, he would arrange that the case be assigned to him; and he would rule against HARRY G. JOHN no matter what the evidence showed. On October 5, 1984, ERICA P. JOHN and DONALD P. GALLAGHER filed a lawsuit as individuals, not as a corporation lawsuit, a copy of which is attached hereto and marked EXHIBIT "1", in which they

alleged that HARRY G. JOHN had wasted the assets from $188,000,000.00 in 1983 to below $83,000,000.00 as of October 4, 1984. ERICA P. JOHN and DONALD A. GALLAGHER both signed the Complaint and verified it under oath.

. . . .

They had aleady been assured that JUDGE MICHAEL J. BARRON would be assigned to the case and would give DONALD A. GALLAGHER and ERICA P. JOHN all the protection they needed to carry out the lawsuit and that, in the end, JUDGE BARRON would rule against HARRY G. JOHN.

. . . .

Arrangements were made with the County Clerk to assign the case to JUDGE BARRON out of order. The procedure of the County Clerk's office in Milwaukee County is to have little colored slips, approximately two inches square, stacked in rotation, so as a case is filed, the judge's court is on one of these slips that are supposed to be taken in rotation and put on each case as it was filed. JUDGE BARRON'S slips were held back for over *fifty* cases. The case number was 650555, and the last previous case JUDGE BARRON had was case number 650505. The Clerk also held back the cases to assign JUDGE BARRON the case of a *John Miller v. DeRance, et al.*, which was a companion case.

. . . .

JUDGE MICHAEL J. BARRON was an agent of the co-conspirators, rather than an independent jurist acting in accordance with the laws of the State of Wisconsin, and should have disqualified himself from the case.

In paragraph 32, Judge Barron is accused of making false and slanderous remarks about Harry John in his August 1986 decision. And in paragraph 36, Mr. John lists eleven ways in which Judge Barron allegedly violated his right to due process and equal protection during the lawsuit in Milwaukee County circuit court.

In paragraph 41 John claims that an appeal of that lawsuit would be unproductive:

> Plaintiff feels it would be unproductive to take an appeal because THOMAS CANNON and WILLIAM CANNON'S father is a former Judge of the Milwaukee Circuit Court, and is a former Judge of the Court of Appeals. Further the Court of Appeals is physically very close to JUDGE MICHAEL J. BARRON and their offices are in the same building, within a few feet of each other, and that the Court of Appeals will do what it can to protect JUDGE BARRON and his orders.

Quite understandably, these serious and wide-ranging allegations have precipitated a number of motions to dismiss the complaint on many different theories. Because there is some duplication, I will not discuss each individual motion. Instead, I will discuss the issues involved.

This is an action brought pursuant to 42 U.S.C. § 1983, which, of course, provides a cause of action for persons who are deprived of their constitutional rights by persons acting under color of state law. In some circumstances, private persons may be sued if they are acting in concert with state officials. The essence of the complaint here then must be that the Cannons, the Gallaghers, and Erica John conspired with Judge Barron, a state official, to deprive Harry John of his constitutional rights. At one point in

the complaint, as indicated above, it appears that the constitutional right involved is his fourteenth amendment right to a fair trial (see paragraph 36). Other times, it appears that John claims a constitutional right to maintain his position with the corporations.

Turning first to the constitutional rights involved in this lawsuit, I am convinced that Mr. John does not have a constitutionally protected property interest in his positions with the corporations. He states in his complaint at paragraph 8 that "Erica P. John and Donald A. Gallagher had the majority vote on both Boards of Directors which gave them the power to remove any officer and control the corporation without the Court's intervention." Mr. John has admitted, by this allegation, that he did not have a constitutionally protected property interest in his positions with the corporations.

Furthermore, Wisconsin statutes provide for the removal of an officer of a corporation by the persons authorized to elect or appoint the officer "whenever in their judgment the best interests of the corporation will be served thereby." § 181.26, Wis. Stat. The statutes also confer jurisdiction on the state courts to suspend and remove officers. §§ 776.32(3) and 776.32(4), Wis. Stat. To have a property right in a position, one must have a "legitimate claim of entitlement to it." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). Mr. John cannot maintain a section 1983 civil rights suit alleging that he was deprived of a property right when he was removed from his positions as an officer with the corporations.

If Mr. John is claiming the deprivation of a liberty interest based on allegedly slanderous comments about him, that claim must also fail. Allegations of damage to reputation are not sufficient to invoke the protections of

the due process clause. *Paul v. Davis,* 474 U.S. 693; *reh'g denied,* 425 U.S. 985 (1976).

That leaves the allegations in paragraph 36 of the complaint, where Mr. John seems to be alleging that his fourteenth amendment rights were violated in the manner in which the trial was conducted. He seeks an injunction to prevent enforcement of the state court judgment. He also seeks damages from the defendants, including Judge Barron.

Mr. John has a constitutional right, of course, to due process of law. In the context of this case, the allegations regarding constitutional violations at trial present complex problems. The allegations actually look a lot like an attempt to appeal from an adverse state circuit court decision. But Mr. John has not appealed within the state court system because he alleges that another (or perhaps the same) conspiracy exists whereby the court of appeals will protect Judge Barron. So, the allegations are both serious and complex.

Dismissal is sought on the claims against Judge Barron on various grounds: judicial immunity, abstention, comity and federalism. And here, the concepts interact with one another.

Judge Barron enjoys an absolute judicial immunity from a suit for damages for actions taken in his judicial capacity:

> [J]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.

Stump v. Sparkman, 435 U.S. 349, 355 (1978). His immunity extends to cases in which allegations are made that

the judge participated in a conspiracy which began prior to the filing of the lawsuit. See *Ashelman v. Pope*, 793 F.2d 1072 (9th Cir. 1986); *Miller v. Duffin*, 637 F. Supp. 496 (N.D. Ind. 1986); *Glick v. Koenig*, 766 F.2d 265 (7th Cir. 1985). So, Judge Barron is immune.

The fact that the judge, who is the state official for section 1983 purposes, is immune from suit does not, however, mean that the others, the private persons alleged to be co-conspirators, are entitled to dismissal as well at this time. In fact, they have not moved for complete dismissal, or if they have done so, it is camouflaged so well in their papers that I can't find it. The law on the point seems clear:

> Private parties who corruptly conspire with a judge in connection with such conduct are thus acting under color of state law within the meaning of § 1983 . . .

Dennis v. Sparks, 449 U.S. 24, 29 (1980).

Judge Barron's absolute immunity does not extend to the request for prospective relief, such as the request for an injunction here. *Pulliam v. Allen*, 466 U.S. 522 (1984). However, the request for an injunction brings the doctrines of comity, federalism, and abstention into play. In *Pulliam* the Court saw no need to grant a judge immunity from injunctive relief because of the existence of these other doctrines:

> The concern, therefore, has been addressed as a matter of comity and federalism, independent of principles of judicial immunity. We reaffirm the validity of those principles and the need for restraint by federal courts called on to enjoin the actions of state judicial officers. [Footnote omitted.]

At 539.

This is a case in which a grant of injunctive relief as requested by Mr. John, which would preclude enforcement of a state court directive, would violate principles of comity and federalism.

The federal district court is not the proper forum on this point, and abstention is appropriate. The Supreme Court stated in *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 609 (1975), that "*Younger [Younger v. Harris*, 401 U.S. 37 (1971)] standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies."

One of those standards is that the plaintiff not have an adequate remedy at law. Mr. John has adequate remedies. He can, or he could have sought, to appeal the state court decision. Furthermore, section 806.07(c), Wisconsin Statutes, provides that unsuccessful litigants can seek to have a judgment set aside for fraud. Additionally, if it is the Wisconsin Court of Appeals which John does not trust, he can move to bypass that court and go directly to the Wisconsin Supreme Court. § 808.05 (1), Wisconsin Statutes.

To summarize, Mr. John has claimed that his rights to due process and the equal protection of the laws were violated. Specifically, he seems to claim a property interest in his offices with the corporations; a liberty interest in his reputation; and due process rights at trial. I have found that while he possesses the latter, he does not, in this case, have a constitutionally protected property interest in remaining an officer of the corporations nor does he have a constitutionally protected liberty interest that has been violated

Concentrating on his due process rights before and at trial, I conclude under the unique facts of this case that a

federal court should abstain from ruling on all requests for equitable relief because to do so would interfere with potential state proceedings. As to his claim for damages resulting from the violations, I have found that Judge Barron is immune from suit, but that the suit can at this time be maintained against the private defendants for the alleged corrupt conspiracy to subvert Mr. John's rights.

And so, what is left of this case is hanging from a very thin thread. For it to continue to live, the plaintiff must demonstrate that Judge Barron (although dismissed as a party to the suit) was involved in a conspiracy with at least one of the other defendants to deprive Mr. John of his constitutional right to receive a fair trial uninfluenced by sordid things like corruption and bribery. Needless to say, these allegations are extremely serious. If unfounded, they are bait for substantial sanctions under rule 11 against Mr. John and against his lawyer, Thomas J. Jeffers, Jr. of Montrose, California. Although I am allowing what is left of this case to proceed, everyone is put on notice that I intend to deal firmly with parties and/or lawyers who make unfounded claims that go to the very integrity of the discharge of duties by a sitting Milwaukee County circuit judge.

In his rule 11 decision released today, Judge Warren found the allegations of Mr. John, made through Mr. Jeffers, to be "outlandish and blatant." The allegations made here are the same. Because of the unusual nature of the plaintiff's claims against Judge Barron, particularly because those claims may have no basis in fact, I believe it would be unwise to allow the plaintiff to simply jump into the sea of discovery and wallow there uncontrolled or undirected by the court. In my opinion, no judge who issues a decision adverse to a litigant should then be forced to submit to discovery at the behest of that

losing litigant on a vague and perhaps slanderous charge that the judge made the decision because he was involved in a conspiracy with the winning parties. Therefore, I intend to exercise control over the kind of discovery that will be permitted.

Therefore, in addition to the orders that I will now issue, I direct that a hearing be held on January 20, 1989, at 9:00 a.m., and that Mr. John, with attorney Jeffers, state precisely what concrete evidence they have, or what evidence they expect to develop, that would support the naked claims of conspiracy that have been made. In that regard, and until I am convinced that the winds of merit in this case are blowing in the plaintiff's direction, the recently filed motion by the plaintiff for a TRO is DENIED.

Also, IT IS ORDERED that the claims of De Rance, Inc. and Santa Fe Communications are DISMISSED.

IT IS FURTHER ORDERED that defendants Does I through XX are DISMISSED.

IT IS FURTHER ORDERED that Judge Michael J. Barron is DISMISSED as a defendant.

IT IS FURTHER ORDERED that all claims for equitable relief are DISMISSED.

Lastly, rule 11 sanctions against the plaintiff are called for here, but I will not consider them now. I only want to consider sanctions once, when everything is done, and so I elect to wait until all other issues are resolved. Counsel for the parties must send me a letter, within thirty days, suggesting the steps they believe I should now take to move this case further along.

Dated at Milwaukee, Wisconsin this 15th day of December, 1988.

BY THE COURT:

TERENCE T. EVANS

Terence T. Evans
United States District Judge

Copy mailed to attorneys for parties by the Court pursuant to Rule 77(d) Federal Rules of Civil Procedure.

APPENDIX E

Civil Action No. 88-C-340

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

HARRY G. JOHN, as an individual;
HARRY G. JOHN, as a Trustee, Director and Officer of De Rance, Inc., and as a Director of Santa Fe Communications; DE RANCE, INC., through its Founder and Sole Contributor, Harry G. John; and SANTA FE COMMUNICATIONS, through its Founder, Harry G. John, in a derivative capacity,
Plaintiffs,

v.

DONALD A. GALLAGHER, IDELLA GALLAGHER; ERICA P. JOHN; WILLIAM CANNON; AND THOMAS CANNON,
Defendants.

U.S. District Court East District Wisconsin
Filed
June 9, 1989
Sofron B. Nedilsky

ORDER

The defendants William Cannon, Thomas Cannon, Erica P. John, Donald A. Gallagher, and Idella Gallagher have filed a motion for summary judgment dismissing the remaining claim against them. That claim is that these defendants were involved in a corrupt conspiracy with Judge Michael J. Barron to deprive Harry G. John of his constitutional rights in violation of 42 U.S.C. § 1983.

The full flavor and background of this case can only be perceived by reading the earlier decisions, particularly those dated December 15, 1988, and April 7, 1989. To summarize, in the December 15 decision I dismissed all of the claims in this action except the conspiracy claim. In addition, Judge Michael J. Barron was dismissed as a defendant based on his judicial immunity. The facts of the case were outlined in that decision. Harry G. John founded De Rance, Inc., a private foundation, in 1946. In 1982, Santa Fe Communications, Inc. was established by the De Rance board of directors. The directors of both corporations were Harry G. John, Donald A. Gallagher, and Erica P. John, Harry John's former wife. The De Rance Foundation distributed millions of dollars primarily to Catholic charities throughout the world.

In 1984, Erica John and Donald Gallagher filed an action in the Milwaukee County circuit court, claiming that Santa Fe and De Rance were nearing bankruptcy. The suit was assigned to Judge Michael J. Barron. Following a trial, on August 21, 1986, Judge Barron found for the plaintiffs and enjoined Harry John from participating in his positions as trustee and director of the De Rance foundation.

Harry John then filed a lawsuit in federal court, which was assigned to Judge Robert W. Warren. That suit was subsequently voluntarily dismissed. However, Judge Warren ultimately found that there was no basis for the lawsuit and that sanctions were appropriate.

Soon after dismissing the lawsuit before Judge Warren, Mr. John filed this suit on March 30, 1988. His contention is that through the state court action, the defendants, including Judge Barron, the Cannon brothers, Erica John, Donald Gallagher, and his wife Idella, conspired to deprive him of his constitutional rights.

I noted in both earlier decisions the troublesome nature of the allegations in the complaint. The April 7, 1989 decision determined that, because of the reckless allegations for which Mr. John could offer no hint of support despite a rather lengthy hearing at which he was allowed to attempt to do that, no discovery would be allowed. Mr. John was required to respond to the motion for summary judgment, which was then pending. Mr. John has now filed a response, and the motion for summary judgment is ready for decision.

The defendants submitted 11 affidavits specifically refuting the allegations of conspiracy in the complaint. Mr. John's response to the motion is set forth in a brief of May 18, 1989. I will quote from the list of things that Judge Barron is supposed to have done in furtherance of the conspiracy:

BARRON REFUSED TO DO THE FOLLOWING PRIOR TO TRIAL

1. Set aside the stipulation keeping Harry G. John off the Board of Directors and as a Trustee.

2. Appoint a receiver to take charge of De Rance, Inc. when it was shown that millions of dollars were being dissipated from the Foundation.

AT THE END OF THE TRIAL

1. At the end of the trial, he slandered Harry G. John before the media, including the television cameras, newspaper media, and "60 Minutes" reporter, accusing Mr. John of being a crook, perjurer, briber, and mentally ill.

2. He delayed his findings of fact and signing a judgment for a year and four months. Judgment signed December 21, 1987. Trial ended August 21, 1986.

3. He finally rendered a judgment to a corporation that was not a party plaintiff for over $1,000,000.00.

4. He rendered a judgment to another corporation that was not a party plaintiff for over $1,200.00.

5. These corporations were not party plaintiffs to the complaint, the grounds were not pleaded in the body of the complaint, and the damages were not prayed for in the prayer, yet Judge Barron granted them.

ANALYZE BARRON'S STATEMENT OF DECISION

1. Judge Barron admitted that all a trustee does is that he is a voting member and all they do is elect directors and other trustees and amend the articles and that there is nothing that a trustee can do wrong by way of gross misconduct, yet he removed Mr. John as a Trustee because he said "that is where the power is." He has admitted by his own words that his job was to take over the Foundation any way he could, and oust Harry John.

2. Trustees as provided in the Articles and By-Laws are appointed for life and have the right to stay in that position as long as they live.

JUDGE BARRON DEPRIVED MR. JOHN OF HIS CONSTITUTIONAL RIGHTS BY:

1. Allowing the plaintiffs to amend the complaint a few weeks before the trial without proper notice.

2. By not allowing Mr. John money to defend himself except to permit De Rance to loan $25,000.00 which is a very small amount.

3. Did not allow a jury trial.

4. He prolonged the trial.

5. He kept evidence of misconduct of Donald A. Gallagher from being introduced into evidence.

6. He refused to bring in the current original minutes of the Board of Directors and the current financial statements.

7. Spent days and days on business decisions of Santa Fe Communications, and HBIA Corporation which had nothing to do with the removal of a trustee or director. Thus put a terrible financial strain on Mr. John and his attorneys.

All of these items can be directed to the Wisconsin appellate courts. It may be that those courts will determine that there were errors in the trial. However, a fundamental principle to American jurisprudence is that a judge has a right to be wrong without being accused of being part of an evil conspiracy. The allegations here are patently rediculous. The motion of the defendants is GRANTED, and this case is DISMISSED.

All along, the defendants have kept me informed that they intend to pursue rule 11 motions following the conclusion of this case. It is now time for those motions to be briefed.

IT IS THEREFORE ORDERED that this action is DISMISSED in its entirety.

Dated at Milwaukee, Wisconsin this 9th day of June, 1989.

BY THE COURT:

TERENCE T. EVANS

Terence T. Evans
United States District Judge